Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

$558,723.32 IN U.S. CURRENCY, ET AL.,
ROBERT A. MICK,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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46 pp

QUESTIONS PRESENTED

Whether probable cause to support seizure of property is to be determined as of the date of seizure or as of the date of the forfeiture hearing.

Whether the failure of the government to follow the law requiring immediate institution of judicial forfeiture proceedings and the resultant one year delay between the seizure of property and the filing of the forfeiture complaint violated Petitioner Mick's due process rights.

PARTIES TO THE PROCEEDING

Petitioner

Petitioner is Robert H. Mick, an individual citizen residing in the Northern District of Ohio. Petitioner has no corporate affiliations. Robert H. Mick was the claimant to the property identified as $558,723.32 in U.S. Currency, et al. in the District Court, and the Appellant in the Sixth Circuit Court of Appeals.

Respondent

Respondent is the United States of America. Respondent was the Plaintiff in the District Court and the Appellee in the Sixth Circuit Court of Appeals.

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Petitioner respectfully petitions for a Writ of Certiorari to review the judgment of the Sixth Circuit Court of Appeals in this case.

OPINIONS BELOW

The Sixth Circuit opinion (App. A. at 1a) is unreported. A transcript of the opinion from the Bench is included in Appendix A at 2a-a. The District Court opinion (App. B. at a) is unreported.

STATEMENT OF JURISDICTION

The judgment of the Sixth Circuit Court of Appeals was entered on December 6, 2002.

The jurisdiction of this court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional and statutory provisions:

I. CONSTITUTIONAL PROVISIONS

A. Fourth Amendment, United States Constitution, prohibiting seizure of property pursuant to warrants issued without probable cause.

B. Fifth and Fourteenth Amendments, United States Constitution, prohibiting deprivation of property without due process.

II. STATUTORY PROVISIONS

A. 19 U.S.C. §1604 which requires the Attorney General to commence forfeiture proceedings without delay.

B. 19 U.S.C. §1610 and 28 C.F.R. 8.8 which require direct referral to the U.S. Attorney for institution of judicial forfeiture proceedings when the value of the property seized exceeds $500,000.00.

C. 19 U.S.C. §1615 which places initial burden of proof in judicial forfeiture proceedings on the government to establish probable cause for the institution of the suit or action.

STATEMENT OF THE CASE

On May 29, 1997 the FBI executed search warrants for Petitioner Mick's house, bank accounts and safe deposit box. The FBI seized $689,036.01 cash, $161,704.00 from investment accounts and various vehicles and personalty.

Despite the fact the value of the property exceeded $500,000.00, the government proceeded with administrative forfeiture proceedings, requiring Mick to file claims and bonds in response to nine separate forfeiture notices. Thereafter, on May 27, 1998, nearly one year to the day following seizure, the government filed its judicial forfeiture complaint as to all of the seized property.

Eleven months later a criminal indictment was filed. Trial began on July 19, 1999 and on July 21, 1999 Mick was

convicted of operating an illegal gambling operation and money laundering.

Relying on that conviction the government filed a motion for Summary Judgment eight days later. Mick filed his motion for Summary Judgment alleging due process violation based on the delays in instituting the forfeiture proceedings.

On July 11, 2001, the District Court filed a Memorandum Of Opinion and Order, and Judgment Entry granting the government's motion and denying the claimant's motion. On July 16, 2001 a Nun Pro Tunc to 11 July 2001 for Clerical Error, Memorandum, Opinion and Judgment Entry were filed.

In rejecting Mick's claim that probable cause for the forfeiture must be assessed at the time of the seizure, not at the time of the forfeiture hearing, the District Court relied on Sixth Circuit decisions in *United States v. $67,220.00 in United States Currency*, 957 F.2d 280 (6th Cir. 1992) and *United States v. One 1974 Lear Jet 24D*, 191 F.3d 668 (6th Cir. 1999), which so held.

The District Court rejected Mick's due process argument, finding the one year delay between seizure and institution of judicial forfeiture not unreasonable; and finding no evidence that the government intentionally delayed the proceedings.

Mick appealed the district court decision to the Sixth Circuit on several issues including error in determining probable cause at the time of the forfeiture hearing, and denial of his due process rights based on delays in initiation of the judicial forfeiture proceeding.

The panel of judges assigned to the case ruled from the bench in favor of the United States. In response to Mick's argument regarding the appropriate time for determination of probable cause for the seizure, the panel acknowledged its obligation to follow the Sixth Circuit case law cited above.

In response to Mick's due process arguments, the panel found no unreasonable delay and no violation in the failure of the government to follow the law which required immediate commencement of judicial forfeiture proceedings without the delays caused by the piecemeal administrative process the government elected to use.

Mick now timely files his Petition for Writ of Certiorari with this Court.

REASONS FOR GRANTING THE PETITION

I. The Decision of the Sixth Circuit Court of Appeals Conflicts With Decisions of Other Circuits.

Both the district court and the Sixth Circuit relied on the Sixth Circuit decisions in *United States v. $67,220.00 in United States Currency*, 957 F.2d 280 (6th Cir. 1992), and *United States v. One 1974 Lear Jet 24D*, 191 F.3d 668 (6th Cir. 1999), in determining that probable cause is required to be established at the time of the forfeiture hearing and not at the time of the seizure.

In *$67,220.00 in United States Currency*, the Sixth Circuit acknowledged other circuits which require that probable cause be measured at the time of the seizure, but this Court then adopted the approach of the Second Circuit in *United States v. 4492 S. Livonia Rd.*, 889 F.2d 1258, 1268 (2nd Cir. 1989).

The First, Eight and Ninth Circuits have all held that the government must demonstrate the existence of probable cause at the time it institutes the forfeiture proceedings.

The First Circuit's decision is *United States v. Parcels of Property*, 9 F.3d 1000 (1st Cir. 1993). The Eighth Circuit's decision is *United States v. $91,960.00*, 897 F.3d 1457 (8th Cir. 1990). The Ninth Circuit's decision is *United States v. $191,910.00 in U.S. Currency*, 16 F.3d 1051 (9th Cir. 1994).

There is no logical or legal basis to reconcile the split of authority between the Second and Sixth Circuits and the First, Eight and Ninth Circuits. Persons living in the Second and Sixth Circuits are now afforded substantially less protection against seizures without probable cause than those persons living elsewhere in the country.

II. The Decision of the Sixth Circuit Is Incorrect.

A. The law is clear that the government must demonstrate probable cause at the time of the seizure of property allegedly subject to forfeiture.

1. The plain language of the Fourth Amendment requires that no warrants shall issue but upon probable cause.

2. The plain language of 19 U.S.C. §1615 provides that in forfeiture proceedings probable cause shall first be shown for the institution of such suit or action.

The statute is not cast in abstract or general terms. "It . . . does not simply say that the

government must have "probable cause for its action." It says the government must have probable cause for the institution of such action. The clear import of this language is that the government must show that it had probable cause to institute - - that is, probable cause at the time it instituted – the suit or action in which it seeks to forfeit the claimant's property." *United States v. $191,910.00 U.S. Currency*, 16 F.3d 1051, 1066 (9th Cir. 19994).

3. The plain meaning of a statute is ordinarily dispositive unless that meaning is contrary to the legislature's intent or would lead to absurd results. See *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 432, 107 S.Ct. 1207, 1213, 94 L.Ed.2d 434 (1987).

Neither exception arises here to suggest anything other than application of the statute's plain language.

4. Forfeiture statutes are to be strictly construed. See *United States v. One 1936 Model Ford V-8 Deluxe Coach*, 307 U.S. 219, 226, 59 S.Ct. 861, 864, 83 L.Ed. 1249 (1939).

B. The delay between seizure, filing and determination of forfeiture violated Mick's due process rights.

1. The Fifth and Fourteenth Amendments prohibit deprivation of property without due process of law.

2. Individuals are entitled to due process in forfeiture proceedings. *United States v. James Daniel*

Good Real Property, 510 U.S. 42, 114 S.Ct. 492 (1993).

3. The Attorney General is required to commence proceedings without delay when seized property is identified as being subject to forfeiture. 19 U.S.C. §1604.

4. When the value of the seized property is less than $500,000.00 administrative forfeiture proceedings are to commence. 19 U.S.C. §1607.

5. Where the value of the seized property exceeds $500,000.00, a report shall issue to the United States Attorney for the district in which the seizure was made for the institution of judicial forfeiture proceedings. 19 U.S.C. §1610; 28 C.F.R. §8.7.

In this case the value of seized property exceeded $500,000.00, thus precluding administrative proceedings and requiring the initiation of judicial forfeiture proceedings without delay. Instead the FBI employed a tedious administrative process which required the posting of no less than nine claims and bonds by Mick, and which proceeded at a pace even slower than the usual administrative proceedings according to the testimony of the FBI forfeiture paralegals involved.

As a result, the judicial forfeiture complaint was not filed until May 27, 1998, almost one year to the day following seizure.

> 6. A due process violation is determined by considering (1) length of delay; (2) reason for delay; (3) assertion of right; and (4) prejudice to defendant.

United States v. $8,850.00, 461 U.S. 555, 564, 103 S.Ct. 2005, 2012 (1983).

The delay was intentionally caused by the government's failure to immediately initiate judicial forfeiture proceedings. The government knew they were operating in a Circuit that measured probable cause at the time of the forfeiture hearing instead of at the time of seizure. Delay in institution of proceedings thus provided more time for development of evidence to support the seizure. Mick was clearly prejudiced.

III. The Questions Presented Is Important.

Forfeitures are disfavored. Forfeiture statutes are to be strictly construed. The government violated the plain language and direction of the forfeiture statutes to intentionally delay the judicial determination.

The government took unfair advantage of the law in the Sixth Circuit which permits evidence acquired after the seizure to be used in determining whether probable cause existed for the seizure itself.

The process employed here constitutes a substantial violation of the fundamental constitutional rights of citizens of the Sixth Circuit.

IV. The Decision of the Sixth Circuit Encourages The Government To Ignore Constitutional and Statutory Requirements For Timely Filing of Forfeiture Proceedings.

This Decision demonstrates that in the Sixth Circuit the government is permitted to obtain a warrant for seizure of property upon a probable cause determination by a Magistrate, knowing that the reviewing Court will not be limited only to consideration of the evidence presented to the Magistrate, but instead will consider that evidence and all evidence thereafter acquired from the date of the warrant to the date of the forfeiture hearing.

The government is therefore encouraged to delay the commencement of judicial forfeiture proceedings while additional evidence in support of probable cause is gathered. In this case, the probable cause determination wasn't made until more than three (3) years after the seizure.

The process employed here and endorsed by the Sixth Circuit is entirely inconsistent with the underlying premise that forfeitures are disfavored in the law and forfeitures statutes are to be strictly construed.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 01-3872

[Filed December 6, 2002]

UNITED STATES OF AMERICA Plaintiff-Appellee	)
v.	)
$558,723.32 IN U.S. CURRENCY, ET AL, Defendant-Appellant	)

BEFORE: GUY and BOGGS, Circuit Judges; and EDMUNDS, District Judge*

ORDER

This cause having come on to be heard upon the record, the briefs and the oral argument of the parties, and upon due consideration thereof,

* The Honorable Nancy G. Edmunds, United States District Judge for the Eastern District of Michigan, sitting by designation.

The court finds that no prejudicial error intervened in the judgment and proceedings in the district court, and it is therefore **ORDERED** that said judgment be and it hereby is affirmed.

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green, Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 01-3872

UNITED STATES OF AMERICA Plaintiff-Appellee	)
v.	)
$558,723.32 IN U.S. CURRENCY, ET AL, Defendant-Appellant	)

Counsel for Claimant-Appellant: Paul F. Adamson, Attorney At Law

Counsel for Appellee: Emily Sweeney, United States Attorney
Herbert J. Villa, Assistant U.S. Attorney

TRANSCRIPT

JUDGE BOGGS: You have a seat. As you may know, under Rule 36 of the rules of this court, the court may give a decision from the bench when the panel is unanimously of the opinion as to the proper outcome of the case and when the panel is unanimously of the opinion that, although the case is important and well argued by the parties, is not a general juris prudential significance in that the issues have been decided by previous cases. In this case, the panel is of those opinions and Judge Guy will give the opinion of the court.

JUDGE GUY: Thank you, Judge Boggs. I just like to underscore one of the points that Judge Boggs made because not all the lawyers are intimately familiar with our

procedure of deciding cases from the bench or may not have been previously exposed to them. And I want to underscore that it's only in cases that have been well argued, well presented by the attorneys so that we're not left with any lingering doubts that there's something out there that we haven't been apprised of. So these types of speedy resolutions are actually a compliment to the presentation that the lawyers have made to the court.

Essentially, this is an appeal from a forfeiture judgment entered in behalf of the United States in a civil forfeiture action. The Claimant, Mr. Mick, was charged in a 72 count indictment with illegal gambling and money laundering and was convicted on all counts. There was a direct criminal appeal in that case. And the appellant panel that had that appealed affirmed. And of significance to these proceedings is the fact that the panel indicated that there was no violation of any Fourth Amendment rights of Mr. Mick.

In this case, the property in question was seized -- excuse me -- almost two years prior to the indictment being filed and the complaint for forfeiture was filed some 11 months prior to the indictment. There were motions in the lower court by both sides. And, in essence, the same issues that were raised in those motions are the issues that are presented for -- before us today. And they're really five in number.

As to the government's motions, Mr. Mick argues that there was no probable cause shown that the items seized were used in connection with a gambling business. And, secondly, that probable cause should be determined at the time of the seizure. Not at the time of the forfeiture proceedings.

Then there were three issues in Mr. Mick's own summary judgment motion. One involved the delay in instituting forfeiture procedures with the claim that that violated -- excuse me -- due process rights, a claim that the civil forfeiture procedure amounted to double jeopardy. And, finally, that the initial seizure, the assets, ultimately forfeited violated the Fourth Amendment rights.

The district judge carefully reviewed all of these arguments. And we essentially affirm on the basis of the District Court's opinion. However, I would comment briefly on each of the five issues. Two of them, it appears to the court, really need no discussion at all. Our case law which is controlling on us is to the effect that probable cause must be determined -- may be determined at the time of the proceedings and not at the time of the seizure. And although counsel argues eloquently that perhaps that rule should be changed, other than through some on bond proceedings, we're not at liberty to change that.

As to the argument that his Fourth Amendment rights were violated, that's why I indicated that the direct appeal has some carry-over significance for these proceedings. Because that fact was decided adversely to him in the direct appeal and, thus, is not open to question at this point. In a similar vain, the double jeopardy argument is precluded by Supreme Court decisions to the contrary in the Ursery decision, which is U-R-S-E-R-Y. The court held that civil (inaudible) forfeitures do not constitute punishment. And, again, counsel makes a good try at trying to distinguish that or say that it's been somehow overruled sub silentio with the Bajakajian decision. And we simply disagree and feel that Ursery is still

good law and that there is no double jeopardy because we're not dealing with two criminal proceedings.

Insofar as Claimant's argument that the government didn't establish probable cause for the forfeiture, we feel that the facts of the criminal conviction, the facts relative to the nonpayment of income taxes on the dower amount that was forfeited and the failure to offer no legitimate explanation for how he could have accumulated so much money legitimately is sufficient to meet the government's burden.

Finally, the argument relative to the delay is unavailing. It's clear here that the government could have filed forfeiture procedures earlier than they did. However, there is actions that could have been instituted by Mick and he took no steps to accelerate this matter to force the government to move one way or the other. And also when one studies the case law which is dealt with delay issues in this area of forfeitures, there are numerous cases in which similar or longer delays were held not to violate due process. So, under these circumstances, we believe that the district judge got it right and we affirm.

There is a recording made of these proceedings. And in the event that counsel wishes to have the Court's decision in a written form, why, a copy of what the court has said from the bench may be obtained.

Again, we would thank you for giving us a presentation that enables us to give you a speedy resolution of the issues you've raised.

JUDGE BOGGS: Thank you, Judge Guy. That case has been decided. The clerk may call the next case.

(End of taped proceedings.)

CERTIFICATE

STATE OF OHIO)
) SS:
SUMMIT COUNTY)

I, Lisa A. Mancini, a Stenographic Reporter, do hereby certify that I transcribed to the best of my ability, from a cassette recording, an excerpt of the proceedings had in the foregoing-entitled matter, being an Excerpt of Proceedings; and I do further certify that the foregoing-entitled Excerpt of Proceedings, consisting of six (6) pages, is a true and accurate transcription from a cassette recording of said matter and Excerpt of Proceedings.

/s/_____
Lisa A. Mancini, Reporter

Dated: Akron, Ohio
February 27, 2003

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

NO. 5:98 CV 1218

[Filed July 11, 2001]

UNITED STATES OF AMERICA Plaintiff	)
v.	)
$558,723.32 IN U.S. CURRENCY, et al, Defendants	)

JUDGE LESLEY WELLS

NUNC PRO TUNC TO 11 JULY 2001 FOR CLERICAL ERROR:
MEMORANDUM OF OPINION AND ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DENYING CLAIMANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiff the United States of America filed a complaint in forfeiture against $1,491.90 in U.S. Currency; $1,871.69 in U.S. Currency; $126,950.00 in U.S. Currency; $558,723.32 in U.S. Currency; 1995 Oldsmobile Aurora

VIN; 1G3GR62CSX4129230;[1] 1996 Chrysler Town and Country LX Minivan VIN: 1C4GP55L9TB254650; Miscellaneous Electronic Equipment and Safe; Securities Account Number 69819300 at Shepard & Vrbanac Securities, Inc.; and Securities Account Number 17868408 at Butler, Wick & Company, Inc., on 27 April 1998. Claimant Robert H. Mick filed an answer to the complaint on 3 June 1998. The United States filed a motion for summary judgment on 29 July 1999, Mr. Mick filed a motion for summary judgment in addition to a response to the government's motion on 1 October 1999. On 12 July 2000, this Court referred the matter to United States Magistrate Judge Jack B. Streepy to file a report and recommendation ("R&R") on the pending motions. Magistrate Judge Streepy filed his R&R on 21 September 2000, recommending the Court deny Mr. Mick's motion for summary judgment and grant that of the United States of America. Mr. Mick filed objections to the R&R on 2 October 2001, and the United States filed a response on 6 October 2000.

I. Background

According to Magistrate Judge Streepy's R&R, the undisputed facts are as follows:

> The defendant property was seized on or about May 29, 1997 .... In 1999, a 72-count indictment was filed against Mick (see United States v. Mick, 5:99CR126 (1999)), alleging

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[1] The complaint was settled regarding this piece of property with Harriet L. Brodzinski on 9 August 1999.

> he engaged in an illegal gambling business and related crimes. Mick moved to suppress the defendant property, which was denied. His criminal jury trial commenced on July 19, 1999, and on July 21, 1999, he was convicted of one count of operating an illegal gambling business, one count of using interstate telephone facilities to promote the illegal business, and 69 counts of money laundering to conceal the illegal business. The United States claims "the same criminal conduct [leading to the convictions is] the basis for forfeiture." (Doc. 33 at 4) (footnote omitted).

(R&R at 4).

II. Objections

A. Standards

Under Fed. R. Cir. P. 72(b) and 28 U.S.C. §636(b)(1)(C), the Court reviews de novo the portion of the Magistrate Judge's report and recommendation to which specific objection was made. In this case, Mr. Mick raises three objections concerning Magistrate Judge Streepy's recommendation to grant summary judgment to the United States of America[2] and three objections to the

---

[2] In his objections Mr. Mick assigns several errors to the Magistrate Judge's finding of probable cause. As his assignments of error all relate to the same issue, here they have been consolidated into one objection.

recommendation that his motion for summary judgment be denied.

Because the parties have moved for summary judgment, this Court's analysis of Mr, Mick's objections is governed by Rule 56 of the Federal Rules of Civil Procedure. Under that standard, summary judgment is appropriate if the evidence in the record shows there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c), The Supreme Court has further explained:

> [T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.

Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). Where the nonmoving party bears the burden of proof in the case, the initial burden on the moving party under Rule 56 "may be met by pointing out to the court that the respondent, having had sufficient opportunity for discovery, has no evidence to support an essential element of his or her case."

Betkerur v. Aultman Hosp. Ass'n, 78 F.3d 1079, 1087 (6th Cir. 1996),

"When a motion for summary judgment is made and supported as provided in [Rule 56], an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but... must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). The "mere existence of a scintilla of evidence in support of the [nonmovant]'s position will be insufficient; there must be evidence on which the jury could reasonably find for the [nonmovant]." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). In considering a motion for summary judgment, the evidence must be viewed in the light most favorable to the party opposing the motion, Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986), but "conclusory allegations standing alone will not defeat a properly supported motion for summary judgment." White v. York Int'l Corp., 45 F.3d 357, 363 (10th Cir. 1995).

B. Mr. Mick's Objections to Granting of Summary Judgment for the Plaintiff

As noted above, Mr. Mick raises three objections to Magistrate Judge Streepy's recommendation to grant summary judgment for the United States of America. First, he objects to the Magistrate Judge's finding that Mr. Mick was collaterally estopped from challenging the fact that he was engaged in an illegal gambling business in violation of 18 U.S.C. § 1955. Second, Mr. Mick argues that the Magistrate Judge erred in concluding that probable cause must be

assessed at the time of the forfeiture hearing and not as of the date of seizure. Third, Mr. Mick contends that the Magistrate Judge erred in finding that no genuine issue of material fact remains regarding probable cause.

1. **Objection: the Magistrate Judge Erred In Deciding that Collateral Estoppel Applies to Prove that Mr. Mick Engaged in an Illegal Gambling Business.**

Magistrate Judge Streepy stated in his report and recommendation:

> Mick's gambling business violated 18 U.S.C. §1955. This forfeiture proceeding is based, inter alia, on 18 U.S.C. §1955(d) which states that "[a]ny property, including money, used in violation of...section [1955] may be seized and forfeited to the United States."
>
> The burden of proof is on Mick to establish, by a preponderance of the evidence, that the seized property was not subject to forfeiture; however, the initial burden is on the United States to establish there was probable cause for the seizure. The United States of America v. Four Contiguous Parcels of Real Property, 191 F.3d 461, 1999 WL 701914, at *3-4 (6th Cir. 1999), petition for cert. filed (Mar. 9, 2000) (No. 99-1501). See also, United States v. 318 South Third Street, 988 F.2d 822, 824, 825 (8th Cir. 1993); United

States v. Real Property 35555 Little Mack, 211 F.3d 1271, 2000 WL 571985, at *3 (6th Cir. 2000) (TABLE, text in WESTLAW). If unrebutted, the showing of probable cause alone will support the forfeiture. Real Property, 2000 WL 571985 at *3.

The United States contends Mick's conviction is collateral estoppel that he engaged in an illegal gambling business in violation of 18 U.S.C. §1955. (Doc. 29 at 2-3.) Collateral estoppel applies if the following factors are present: (1) the issue in the prior proceeding must have been identical to the issue asserted in the current matter; (2) the issue must have been actually litigated; and (3) it must have been necessary and essential to the judgment on the merits; and (4) the party against whom estoppel is sought must have had a full and fair opportunity to litigate the issue in the prior proceedings. United States v. Real Prooerty Known and Numbered as 415 East Mitchell Avenue, Cincinnati, Ohio, 149 F.3d 472, 476 (6th Cir. 1998).

The issue of whether Mick conducted an illegal gambling business for purposes of forfeiture is identical to one of the issues tried in his criminal prosecution, and his conviction shows the issue was actually litigated therein and was necessary and essential to said conviction .... Accordingly, collateral estoppel

> applies to prove that Mick engaged in an illegal gambling business in violation of 18 U.S.C. § 1955.

(R&R at 5-6).

Mr. Mick raises a specific objection to the Magistrate Judge's conclusion that "collateral estoppel applied to prove that MICK engaged in an illegal gambling business." Specifically, he argues that his criminal trial may have addressed the question of whether he operated an illegal gambling business, but it did not address the question of whether the $668,000 at issue were proceeds from that business. According to Mr. Mick, the fact that he was convicted of running such a business over the course of five years "does not support a conclusion that [he] was violating federal law on each and every day of those five years." As such, he concludes, his conviction also does not establish that any and all funds he accumulated during that period were subject to forfeiture. (Objs. at 2).

This argument is unavailing. The Magistrate Judge relied on Mr. Mick's conviction only to establish that Mr. Mick engaged in an illegal gambling operation, a fact that was fully and fairly litigated in the criminal proceeding. The Magistrate Judge did not rely on Mr. Mick's conviction to create the necessary link between the illegal activity and the items subject to forfeiture. As discussed more fully below, the Magistrate Judge instead rested his probable cause determination on the value of the property seized, on Mr. Mick's tax returns, and on his failure to produce any evidence

that the defendant property represented legal income. Mr. Mick's first objection is therefore overruled.

2. **Objection: the Magistrate Judge Erred in Deciding that probable cause Must be Assessed from the Time of the Forfeiture Hearing and not as of the Date of the Seizure**

Magistrate Judge Streepy relied on the Sixth Circuit decisions in United States v. $67,220.00 in United States Currency, 957 F.2d 280 (6th Cir. 1992), and United States v. One 1974 Lear Jet 24D, 191 F.3d 668 (6th Cir. 1999), in determining, that probable cause is established at the time of the forfeiture hearing. Mr. Mick contends that these decisions are inconsistent with the plain language of 19 U.S.C. § 1615 which states: "in all suits or actions... brought for the forfeiture of any vessel, vehicle, merchandise, or baggage seized... probable cause shall be first shown for the institution of such suit or action." However, the Sixth Circuit has interpreted the phrase "such suit or action" as referring not to the seizure, but to the civil proceeding. As such, "a district court must assess probable cause at the time of the forfeiture hearing." United States v. $67,220.00 in U.S. Currency, 957 F.2d at 284. The Court thus finds Mr. Mick's objection to be without merit.

3. **Objection: the Magistrate Judge Erred in Finding that No Genuine Material Issue of Fact Remains Regarding Probable Cause**

As stated above, "[t]he burden of proof is on Mick to establish, by a preponderance of the evidence, that the seized

property was not subject to forfeiture; however, the initial burden is on the United States to establish there was probable cause for the seizure." (R&R at 4). Under this standard, Magistrate Judge Streepy determined that no genuine material issue of fact remained concerning whether the government had probable cause to seize the defendant property.

> The United States has submitted Mick's federal income tax returns for the years 1993 through 1995 which show an income loss of more than $25,000 in 1993, income of slightly more than $12,000 in 1994, and income slightly more than $15,000 in 1995. Mick was convicted of conducting an illegal gambling business from January 1, 1994 into October of 1998 (see indictment in United States v. Mick), thus the defendant property, seized in May of 1997, was seized approximately 41 months after Mick started his illegal business and approximately 17 months before he ended it.
>
> . . . .
>
> In summary, the collateral estoppel evidence (which proves Mick operated an illegal gambling business from January 1, 1994 to October of 1994), in combination with the high value of the property seized (in excess of $800,000), the fact it was seized during the period Mick was operating his illegal gambling business, and the fact there is no evidence to reflect an innocent source of the defendant

> property, establishes there is no genuine issue that there was probable cause that the defendant property was used in Mick's illegal gambling business in violation of 18 U.S.C, §1955. Since Mick has not submitted any evidence to rebut the probable cause determination, forfeiture should be ordered unless Mick's motion on other issues has merit.

(R&R at 6-7).

Mr. Mick objects to the Magistrate Judge's statement that he has submitted no evidence to rebut the probable cause determination. (Objs. at 3). Specifically, he maintains he has submitted a verified complaint acknowledging both his filing of claims of ownership to all of the defendant property and his objection to the forfeiture proceeding. He further maintains the documents attached to his motion to suppress offer evidence of a failure of probable cause.

However, the question of whether Mr. Mick made timely claims to ownership of the defendant property does not speak to the question of probable cause, and Mr. Mick has pointed to nothing in the documents attached to his motion to suppress that give rise to an issue of material fact. Therefore, because Mr. Mick has failed to set forth specific facts showing that there is a genuine issue for trial, Fed. R. Civ. P. 56(e), his objections are overruled.

C. Mr. Mick's Objections to Denying Summary Judgment for the Claimant

Mr. Mick raises three objections to Magistrate Judge Streepy's recommendation that his motion for summary judgment be denied. First, Mr. Mick contends that the Magistrate Judge erred in finding that Mr. Mick's right to due process had not been violated by the passage of time between the seizure of property and the forfeiture complaint. Second, Mr. Mick objects to the Magistrate Judge's determination that the civil forfeiture does not constitute double jeopardy. Third, Mr. Mick objects to the Magistrate Judge's finding that Mr. Mick's Fourth Amendment rights were not violated by the seizure of property.

1. Objection: The Magistrate Judge Erred in Finding that Mr. Mick's Right to Due Process Had Not Been Violated

Magistrate Judge Streepy found that despite the approximately one-year delay between the government's seizure of the property and the filing of the forfeiture action, Mr. Mick's right to due process of law was not violated.

> Four factors are considered in determining whether due process was violated: (1) length of the delay, (2) the reason for the delay, (3) defendant's assertion of his right, and (4) prejudice to the defendant. United States v. $8,850.00, 461 U.S. 555, 564 (1983) (cited in Real Property 35555 Little Mack,

2000 WL 571985, at *3). Following is a summary of the relevant dates.

The seizures occurred on or about May 29, 1997. During a period commencing July 8, 1997 and ending October 2, 1997, the Cleveland office of the FBI forwarded the requisite notice procedure and related documents to the FBI administrative services division in Washington, D.C. for the purpose of commencing administrative forfeiture proceedings.

The FBI administrative services division forwarded the standard notices of the seizures and intent to forfeit property to Mick during a period beginning July 24, 1997 and ending on February 4, 1998. The FBI division also forwarded, commencing September 5, 1997 and ending February 24, 1998, the relevant forfeiture files to the United States Attorney for initiation of judicial forfeiture proceedings.

By March 31, 1998, Mick had not been criminally charged nor had the United States commenced civil forfeiture proceedings. As a result, Mick filed a complaint (approximately ten months after the items were seized) in this court for the return of the seized property. See Mick v. United States of America, 5:98CV0758 (1998).

Approximately two months later, on May 27, 1998, Mick voluntarily dismissed his action based upon representations of the United States Attorney's office that "either a civil forfeiture action or a criminal complaint with forfeiture demand" shall be filed "forthwith" by the United States. (Plaintiff's exhibit B.) On the same date, the forfeiture action, sub judice, was filed approximately 12 months after the seizure.

Mick summarizes his due process argument by stating the government seized over $800,000 of his assets in May of 1997, did not file his forfeiture complaint until approximately 12 months later, and did not file criminal charges until April of 1999 which meant he was required to defend his criminal case while the government "held all of his assets." (Doc: 38 at 3-4.)

A 29 month delay has been held not to violate due process. Id., at *3-*4 The government continued to investigate Mick for at least 16 months after the May 1997 seizure, as evidenced by the fact he operated his illegal gambling business into October of 1998. "A prior or contemporaneous civil proceeding could substantially hamper the criminal proceeding." $8,850.00, 461 U.S. at 567, The United States cannot be faulted for waiting until May 27, 1998 to file its forfeiture action

> under these circumstances. The first two factors are favorable to the United States.
>
> Concerning the factor of asserting his right, Mick did not file his civil action for the return of the defendant property until approximately 10 months after the seizure, which was only two months before this forfeiture action was filed. Failure to seek a legal remedy "can be taken as some indication that the claimant did not desire an early judicial hearing." (Id. at 569.)
>
> Concerning the prejudice factor, it appears Mick contends that since his assets were held by the government during his criminal case, he was prejudiced in defending against the indictment. He has failed to submit any evidence to support this claim. Moreover, the time and place to do so was in his criminal case.
>
> In summary, all four factors are favorable to the United States. Mick has failed to show there is a genuine issue of material fact that his right to due process was violated.

(R&R at 8-11).

Mr. Mick objects to three specific aspects of the Magistrate Judge's findings. First, he argues the FBI did not follow standard procedure and that the delays in issuing the

seizure notices and in initiating the forfeiture proceedings were unusual, (Objs. at 4). Second, he claims that the government intentionally delayed the proceeding while they "searched for evidence to support the probable cause they were supposed to have at the time they seized the assets." (Objs. at 4). Third, he contends that he indicated his desire for an early judicial hearing by filing claims of ownership and forfeiture contests to the seized property beginning on 8 September 1997. (Objs. at 5).

Upon de novo review, however, this Court concurs with the recommendations of the Magistrate Judge. First, as Magistrate Judge Streepy stated, a 29-month delay has been held not to violate Due Process, Real Property 35555 LittleMack, 2000 WL 571985, at *3, and the government cannot be faulted for completing its criminal investigation against Mr. Mick before filing its civil complaint. Second, Mr. Mick has offered no evidence to support his assertion that the government delayed the proceedings in order to build a case against him. Third, Mr. Mick's claim that he desired an early judicial hearing is belied by the fact that he waited approximately ten months before filing his civil action for the return of the defendant property. Had Mr. Mick wished to vigorously assert his right he had ample opportunity to file such an action earlier. This Court therefore agrees with Magistrate Judge Streepy's analysis of the factors and finds that no violation of Mr. Mick's right to due process has occurred. His objection is thus overruled.

2. **Objection: the Magistrate Judge Erred in Finding that the Civil Forfeiture Did Not Violate Double Jeopardy**

Magistrate Judge Streepy determined that the civil forfeiture in this case does not constitute double jeopardy. He stated as follows:

> Mick contends that the United States can prevail in this civil case only by proving all elements of his federal gambling violation which violates double jeopardy, citing United States v. Branham, 97 F.3d 835 (6th Cir. 1996). United States v. Ursery, 518 U.S. 267 (1996), "refused to extend [a] 'punishment' rationale to bring forfeiture under the Double Jeopardy Clause." It is "our traditional understanding that civil forfeiture does not constitute punishment for the purpose of the Double Jeopardy Clause." (Id. at 287.) Branham, on which Mick relies, did not discuss Ursery,[3] and did not reach the Ursery issue of double jeopardy. Since Branham and Ursery were decided, and under circumstances similar to those herein, the Sixth circuit noted (in dicta) that a forfeiture of items related to illegal gambling operations, which also led to a criminal conviction, did not raise a double jeopardy issue because the civil forfeiture did

---

[3] It cited the lower court decision for an unrelated reason. Branham, 97 F.3d at 41.

> not constitute a prior punishment for the purpose of double jeopardy, citing Ursery. See Four Conticluous Parcels, 1999 WL 701914 at *4; see also Hawkins v. Czarnecki, 142 F.3d 434, 1998 WL 57333, at *2 (6th Cir. 1998) (TABLE, text in WESTLAW).

(R&R at 12).

Mr. Mick contends that Ursery is inapplicable to the current context because, in that case, the civil forfeiture preceded the criminal conviction and here the criminal conviction predates the forfeiture action. This argument is misguided. The Supreme Court has held that "in rem civil forfeitures are neither 'punishment' nor criminal for purposes of the Double Jeopardy Clause." Ursery, 518 U.S. at 292. Such a clear statement gives no indication that the timing of a civil forfeiture in relation to a criminal penalty is relevant. Regardless of when the civil forfeiture occurs, it does not constitute punishment in terms of double jeopardy. Accordingly, Mr. Mick's objection is found to be without merit.

3. **Objection: the Magistrate Judge Erred in Finding Mr. Mick's Fourth Amendment Rights Were Not Violated by the Seizure**

Mr. Mick has objected to the Magistrate Judge's finding that his 4th Amendment rights were not violated by the seizure. As Magistrate Judge Streepy noted, however, Mr. Mick's motion to suppress the defendant property was denied during the criminal proceeding. As such it is a legally binding

decision and will continue to be until such time, if any, that it is overturned by a higher court. Mr. Mick's contention that the defendant property was illegally seized is thus legally incorrect, and this objection is without merit.

II. Conclusion

For the foregoing reasons, the Magistrate Judge's report and recommendation is adopted and summary judgment will be granted for the United States of America and denied for Mr. Mick with respect to all claims contained in the complaint.

IT IS SO ORDERED,

/s/_____
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF OHIO EASTERN DIVISION

CASE NO. 5:98 CV 1218

[Filed July 16, 2001]

UNITED STATES OF AMERICA Plaintiff	)
v.	)
$558,723.32 IN U.S. CURRENCY, et al, Defendants	)

JUDGE LESLEY WELLS

NUNC PRO TUNC TO 11 JULY 2001
FOR CLERICAL ERROR: JUDGMENT ENTRY

This Court, having previously entered its memorandum of opinion and order granting plaintiff United States of America's motion for summary judgment and denying claimant Robert H. Mick's motion for summary judgment, hereby enters judgment in favor of plaintiff United States of America and orders defendant property $1,491.90 in U.S. Currency; $1,871.69 in U.S. Currency; $126,950.00 in U.S. Currency; $558,723.32 in U.S. Currency; 1996 Chrysler Town and Country LX Minivan VIN: 1C4GP55L9TB254650; Miscellaneous Electronic Equipment and Safe; Securities Account Number 69819300 at Shepard & Vrbanac Securities, Inc.; and Securities Account Number 17868408 at Butler, Wick & Company, Inc. forfeited to the United States of America.

IT IS SO ORDERED.

/s/ _____
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
MAY 12 2003
OFFICE OF THE CLERK

(2)

No. 02-1326

In the Supreme Court of the United States

ROBERT A. MICK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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19 pp

QUESTIONS PRESENTED

1. Whether, under 19 U.S.C. 1615, probable cause to seize property in connection with forfeiture proceedings is determined as of the date of seizure or as of the date of the forfeiture hearing.

2. Whether a 12-month delay between the seizure of petitioner's property and the filing of a civil forfeiture complaint violated petitioner's due process rights.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order and bench opinion of the court of appeals (Pet. App. 1a-8a) are not published in the Federal Reporter, but the judgment is noted at 52 Fed. Appx. 252. The memorandum opinion and order of the district court (Pet. App. 9a-27a, 28a-29a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 6, 2002. The petition for a writ of certiorari was filed on March 6, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On May 29, 1997, and June 2, 1997, FBI agents executed a search warrant and seized numerous items of

personal property belonging to petitioner. On May 27, 1998, the government filed a civil forfeiture complaint against several of those items of property, namely, $689,036.91 in United States currency, two securities accounts (valued at approximately $161,704 at the time of seizure), two vehicles, and miscellaneous electronic equipment. The complaint alleged that petitioner operated an illegal gambling business, in violation of 18 U.S.C. 1955, and that the defendant properties were subject to forfeiture under 18 U.S.C. 1955(d). The complaint further alleged that the defendant properties were involved in money laundering transactions, in violation of 18 U.S.C. 1956 and 1957, and were subject to forfeiture under 18 U.S.C. 981(a)(1)(A).

On July 29, 1999, following petitioner's criminal conviction on illegal gambling and money laundering charges, see *United States* v. *Mick*, 263 F.3d 553, 557 (6th Cir. 2001), the government moved for summary judgment in the civil forfeiture proceeding. On October 1, 1999, petitioner filed a cross-motion for summary judgment. On July 11, 2001, the district court granted the government's motion for summary judgment and denied petitioner's motion. Pet. App. 9a-27a. The court of appeals affirmed. *Id.* at 1a-8a.

1. Petitioner was a bookmaker who resided on Westwood Street in Alliance, Ohio. Before May 1997, petitioner operated his bookmaking business from a trailer at 1505 East State Street in Alliance. The trailer had several telephone lines, including one devoted to a fax machine. Between March 20, 1997, and May 18, 1997, the FBI ran a court-ordered pen register on those lines. The register traced over 3400 calls on the fax machine (98% outgoing), 4000 calls on one telephone line, and over 2400 calls on another (90% incoming). See *Mick*, 263 F.3d at 558. During that time, petitioner received

more than 50 fax transmissions a day and more than 100 incoming telephone calls a day, most which were for a short duration. To increase the number of his betting customers, petitioner had Cheryl Stoiber, a friend from Louisville, Kentucky, maintain an extra telephone line at her home. A call-forwarding service on this line allowed Louisville bettors to make local calls that would be patched through to petitioner's trailer. *Ibid.*

Petitioner took bets from individual bettors and other bookmakers on practically all major sporting events, especially football, baseball, and basketball games. In addition to placing bets for themselves, other bookmakers would place "layoff bets" with petitioner to limit their exposure when their customers bet heavily on one participant in a sporting event. At any given time, petitioner had between 30 and 40 individual bettor clients and at least 9 bookmaker clients. See *Mick*, 263 F.3d at 558.

Petitioner paid $5000 a year to receive a line service from Don Best Sports, which provided up-to-the-minute information on odds, statistics, game information, and other matters of interest to sports bettors. During the football season, he prepared "parlay slips" containing weekly game schedules and point spreads that were sold to customers and employees of various local businesses, including a bar known as the M & M Sports Club in Sebring, Ohio, and B.J.'s Car Wash in Alliance, Ohio. See *Mick*, 263 F.3d at 559.

2. In February 1995, Ohio state police officers and the Stark County, Ohio, Sheriff's Office began investigating petitioner's gambling enterprise. Over several years, the state police and eventually the FBI conducted surveillance of petitioner's activities. They observed petitioner visiting the M & M Sports Club and B.J.'s Car Wash, among other locations, and on two

occasions saw men counting money as they left the sports club while petitioner was inside. Officers examined the club's trash and discovered parlay sheets and betting slips. *Mick*, 263 F.3d at 559.

On May 27, 1997, FBI agent Michael Mihok prepared a 15-page affidavit in support of a request for a warrant to search petitioner's house, trailer, and safety deposit box. Three confidential informants provided information for the affidavit. One source told Agent Mihok that petitioner was operating a gambling business from his trailer, which included six bookmakers working for petitioner, as well as his sons and girlfriend; that petitioner was providing line information to bookmakers and distributing parlay sheets; and that petitioner had a line service and a computer on which he kept his records. A second source provided essentially the same information. Agent Mihok's affidavit stated that both sources had "proven to provide accurate information in the past." *Mick*, 263 F.3d at 559-560.

The affidavit stated that Agent Mihok's third source had "direct knowledge" of petitioner's bookmaking activity. Agent Mihok stated that the third informant was reliable because, *inter alia*, he had never been involved in criminal activity, he had not had past contact with law enforcement, he had been steadily employed for 11 years and was a model citizen, and his only motive was to assist law enforcement. According to the affidavit, the third source was at B.J.'s Car Wash while a friend of his was placing bets with one of petitioner's bookmakers. The friend told the source that the bookmaker had a wagering log, that some of his bettors were police officers, and that the bookmaking enterprise was operated from petitioner's trailer. *Mick*, 263 F.3d at 560.

Agent Mihok's affidavit also included a detailed description of the results of the pen register; a description of the results of the officers' surveillance of petitioner, including his visits to the sports club and the car wash and his meetings with known bookmakers; and a description of the results of the examination of the sports club's trash. And it set forth the agent's knowledge of the business practices of operators of gambling enterprises, including their maintenance of detailed ledgers and records, their hiding of large amounts of currency in their residences or places of business, and their use of computers to store data from their gambling businesses. *Mick*, 263 F.3d at 560.

On the basis of Agent Mihok's affidavit, a magistrate judge issued a search warrant for petitioner's house, trailer, and safety deposit box. FBI agents executed the warrant on May 29, 1997, and June 2, 1997. In petitioner's home, the FBI discovered bank records, gambling records, and almost $550,000 in cash. The trailer yielded more gambling records, computer hardware, telephone equipment, and utility bills. In petitioner's safety deposit box, the agents found, *inter alia*, $127,000 in cash and four silver bars. *Mick*, 263 F.3d at 560; C.A. App. 8.

3. Before his criminal trial, petitioner moved to suppress the evidence seized from his home and trailer, challenging, *inter alia*, the sufficiency of Agent Mihok's affidavit on the ground that it contained material misstatements of the results of police surveillance of petitioner and otherwise failed to show probable cause to search. The district court denied the motion, and the court of appeals affirmed. See *Mick*, 263 F.3d at 562-566. With respect to the alleged misstatements in the affidavit, the courts concluded that "[t]he evidence before this court, even if construed in favor of the defen-

dant, cannot be understood to show that Agent Mihok gave either a knowingly false affidavit or otherwise acted in bad faith." *Id.* at 564. With respect to the question of probable cause to search petitioner's trailer and residence, the courts concluded that there was "much more than sufficient evidence to find a fair probability that contraband would be present." *Id.* at 562.

4. Meanwhile, the government and petitioner both moved for summary judgment in the civil forfeiture proceeding. A magistrate judge recommended that the government's motion be granted and that petitioner's motion be denied. Pet. App. 10a. The district court accepted that recommendation and granted the government's motion for summary judgment. *Id.* at 11a. The court first rejected petitioner's claim that the magistrate judge had erred in concluding that petitioner's criminal conviction collaterally estopped him from contending that he had not been engaged in a criminal gambling business. *Id.* at 14a-17a. Next, relying on *United States* v. *$67,220.00 in United States Currency*, 957 F.2d 280, 284 (6th Cir. 1992), the court rejected petitioner's claim that the magistrate judge had erred in deciding that probable cause to support a forfeiture is to be established at the time of the forfeiture hearing, not at the time of seizure. Pet. App. 17a. The court also rejected petitioner's claim that the magistrate judge had erred in concluding that the case did not present an issue of material fact with respect to probable cause. *Id.* at 17a-19a.

The district court also rejected petitioner's claim that the one-year delay between the seizure of his property and the filing of the forfeiture complaint violated his due process rights. Pet. App. 23a-24a. The court reasoned that (1) the one-year delay was not excessive in light of similar cases; (2) the government was entitled

to press ahead with its criminal investigation of petitioner before filing its civil complaint; (3) petitioner had offered no evidence that the government had deliberately delayed the civil forfeiture proceeding in order to build a case against him; and (4) petitioner himself had waited ten months before asserting a claim to the seized property. *Id.* at 24a. Finally, the court rejected petitioner's claims that the forfeiture proceeding had violated his right to be free from double jeopardy, and that the seizure of his property had violated his rights under the Fourth Amendment. *Id.* at 25a-27a.

5. The court of appeals affirmed by bench opinion. Pet. App. 1a-7a. Relying on case law holding that probable cause to support a forfeiture may be determined at the time of the forfeiture proceedings, the court summarily rejected petitioner's claim that probable cause should be determined at the time of seizure. *Id.* at 5a. Similarly, relying on its disposition of petitioner's direct appeal in his criminal case, the court summarily rejected his contention that the seizure violated his Fourth Amendment rights. *Ibid.* Finally, the court found "unavailing" petitioner's claim that the government's delay in filing the forfeiture complaint had violated his due process rights. *Id.* at 6a. The court noted that petitioner "took no steps to accelerate" the forfeiture process, and that its review of relevant case law had shown "numerous cases in which similar or longer delays were held not to violate due process." *Ibid.* The court concluded that "under these circumstances, we believe that the district judge got it right and we affirm." *Ibid.*[*]

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[*] The court of appeals also rejected petitioner's claims that the forfeiture proceeding violated his rights under the Double Jeop-

ARGUMENT

1. Petitioner contends (Pet. 4-5) that review should be granted because the courts of appeals disagree on whether, under 19 U.S.C. 1615, probable cause to support a forfeiture may be determined at the time of the forfeiture hearing as opposed to at the time that the government filed its forfeiture complaint. Petitioner is correct that the courts of appeals have disagreed about the meaning of 19 U.S.C. 1615. The disagreement, however, has now been resolved by Congress, and it does not warrant this Court's review.

Under Section 1615, the burden of proof is on the person claiming an ownership in the property against which the forfeiture action was brought, provided "[t]hat probable cause shall be first shown for the institution of such suit or action." Some courts of appeals, led by the Ninth Circuit, have held that Section 1615 requires dismissal of a forfeiture complaint unless the government shows that it had probable cause *at the time it filed the complaint.* See, *e.g.*, *United States* v. *$405,089.23 in United States Currency*, 122 F.3d 1285 (9th Cir. 1997) (holding that the government could not rely on a drug dealer's conviction or evidence adduced at the criminal trial to establish probable cause where the forfeiture complaint was filed at the time of indictment); see also *United States* v. *Parcels of Property*, 9 F.3d 1000, 1003-1004 (1st Cir. 1993) (holding that Section 1615 places "a preliminary burden [on the government] to show that it had probable cause *to institute* the forfeiture proceeding"); *United States* v. *$91,960.00*, 897 F.2d 1457, 1462 (8th Cir. 1990) ("[E]vidence to support the probable cause determination includes not only evi-

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ardy Clause, and that the government had not established probable cause to support the forfeiture. Pet. App. 5a-6a.

dence obtained before the seizure of the property subject to forfeiture but also evidence obtained up until the point at which the government institutes forfeiture proceedings."). Other courts of appeals have rejected that reading of Section 1615, holding instead that the government is free at the forfeiture hearing to rely on evidence acquired after the filing of the complaint, and that the only requirement for the complaint is that it satisfy the "particularity" requirement of Supplemental Admiralty and Maritime Claims Rule E(2). See, *e.g.*, *United States* v. *Daccarett*, 6 F.3d 37, 47 (2d Cir. 1993) (complaint need not meet ultimate trial burden of establishing probable cause; it need only establish "reasonable belief that the government can show probable cause for forfeiture at trial") (citation omitted), cert. denied, 510 U.S. 1191 (1994); *United States* v. *Premises & Real Property at 4492 S. Livonia Rd.*, 889 F.2d 1258, 1268 (2d Cir. 1989) (same); *United States* v. *One 1974 Learjet 24D*, 191 F.3d 668, 674 (6th Cir. 1999) (holding that probable cause for seizure and probable cause for forfeiture are different concepts; government does not have to establish probable cause for forfeiture until the time of trial; court may not dismiss complaint on ground that the government lacked probable cause for seizure); *United States* v. *$67,220.00 in United States Currency*, 957 F.2d 280, 284 (6th Cir. 1992) (same).

In 2000, Congress enacted the Civil Asset Forfeiture Reform Act (CAFRA), 18 U.S.C. 981 *et seq.*, which substantially revised the laws governing civil forfeiture. Among other things, CAFRA changed the government's burden of proof for civil forfeiture actions from probable cause, the standard under 19 U.S.C. 1615, to proof by a preponderance of the evidence. 18 U.S.C. 983(c). Congress, moreover, directly resolved the conflict in the circuits related to Section 1615 by making

clear that the government may prove its case at the forfeiture hearing based on evidence acquired *after* the filing of the forfeiture complaint, see 18 U.S.C. 983(c)(2) ("[T]he Government may use evidence gathered after the filing of a complaint for forfeiture to establish, by a preponderance of the evidence, that property is subject to forfeiture."), and that the lack of probable cause at the time the government initiated the forfeiture proceeding does not warrant dismissal of the complaint, see 18 U.S.C. 983(a)(3)(D) ("No complaint may be dismissed on the ground that the Government did not have adequate evidence at the time the complaint was filed to establish the forfeitability of the property."). Accordingly, any disagreement among the courts of appeals with regard to Section 1615 is of little and diminishing significance, and does not require this Court's resolution.

Even if the issue had significance, this case is a poor vehicle for resolving any conflict over Section 1615. As both the record in this case and the court of appeals' decision in petitioner's direct appeal of his criminal conviction reflect, the government had ample probable cause not only at the time of the forfeiture hearing, but also at the time it filed the forfeiture complaint (and, for that matter, at the time the property was originally seized). See *Mick*, 263 F.3d at 565-566. Under any interpretation of Section 1615, therefore, the government satisfied its burden of showing probable cause.

For example, the affidavit by Agent Mihok supporting the search warrant detailed more than sufficient evidence to conclude that petitioner's trailer and the material seized inside it were connected to petitioner's illegal gambling activities. Three separate, reliable informants had identified the trailer as the center of petitioner's illegal gambling enterprise, and

many of the informants' statements had been independently verified by police officers; the police had observed petitioner associating with known gambling figures; and they had discovered "parlay sheets" prepared by petitioner for the purpose of facilitating illegal betting at various local businesses. The officers also had strong evidence through the court-ordered pen registers on the trailer's telephone lines that the trailer was being used for gambling activities. See *Mick*, 263 F.3d at 565-566. That evidence was more than sufficient to establish a "fair probability" that items of property seized from the trailer pursuant to the warrant issued by the magistrate judge would be subject to forfeiture as proceeds of petitioner's "illegal gambling business." *Ibid.*; see 18 U.S.C. 1955(d).

The same is true of the property seized from petitioner's home. The officers had overwhelming evidence that petitioner was at the center of a major illegal gambling enterprise. Although most of that evidence was more directly linked to petitioner's trailer, as the court of appeals in petitioner's direct appeal of his criminal convictions concluded, there was also sufficient probable cause to link petitioner's residence to that illegal activity. In particular, Agent Mihok's affidavit in support of the search warrant detailed his extensive "experience that those who operate gambling businesses store money and records in their residence, even if their home is separate from their principal place of business." *Mick*, 263 F.3d at 566. Moreover, gamblers "often possess large sums of currency," which is "often hidden or concealed in hiding places at ther residences." *Ibid.* Here, it was particularly reasonable to believe that petitioner would store money and other materials related to his gambling enterprise at his residence because his trailer was located in an exposed location

and was often unoccupied. *Ibid.* As the district court that denied petitioner's motion to suppress concluded, "it would not be reasonable for a person engaged in betting to leave large sums of cash or other betting materials at what appears to be an unguarded trailer on a busy road with seemingly no one living at this trailer." *Id.* at 562. Accordingly, because it was "reasonable to conclude that [petitioner's] residence would contain gambling records and money," *id.* at 566, it was also reasonable to conclude that such records would establish that the money and other items of property at petitioner's residence represented forfeitable proceeds of his illegal gambling business.

2. Petitioner also contends (Pet. 6-7) that review is warranted because the one-year delay between the seizure of his property and the filing of the forfeiture complaint violated his due process rights. Petitioner's fact-specific contention lacks merit. The delay between the seizure of petitioner's property and the filing of the forfeiture complaint neither violated his due process rights nor presents an issue of general importance warranting review by this Court.

In *United States* v. *$8,850 in United States Currency*, 461 U.S. 555 (1983), this Court observed that dilatory conduct by the government in initiating civil forfeiture proceedings may violate a claimant's due process rights. The Court said that in balancing the interests of the claimant and the government, four factors should be considered: (1) the length of the delay; (2) the reason for the delay; (3) the claimant's assertion of his right to a judicial determination of his interest in the seized property; and (4) prejudice to the claimant. See *id.* at 564-569.

As for the first factor, the one-year delay in this case is small in comparison to delays found reasonable in

similar cases. In *$8,850 in United States Currency* itself, the Court found that an 18-month delay did not violate the claimant's due process rights. 461 U.S. at 569; see *United States* v. *Turner*, 933 F.2d 240, 246 (4th Cir. 1991) (after balancing four factors from *$8,850 in United States Currency*, court concludes that 16-month delay not unreasonable); *United States* v. *$292,888.04 in United States Currency*, 54 F.3d 564, 567 (9th Cir. 1995) (after balancing same factors, court finds that 30-month delay between seizure and initiation of civil forfeiture proceeding did not offend due process).

Nor do the other three factors identified in *$8,850 in United States Currency* weigh in petitioner's favor. One of the reasons for the delay was to allow the government adequate time to determine whether petitioner's assets should in fact be forfeited. The government was required to complete the administrative process of providing notice to petitioner, referring the case to the proper agency, and evaluating the results of its investigation. See *$8,850 in United States Currency*, 461 U.S. at 565 ("Both the Government and the claimant have an interest in a rule that allows the Government some time to investigate the situation in order to determine whether the facts entitle the Government to forfeiture so that, if not, the Government may return the money without formal proceedings."). In addition, as the Court has recognized (*id.* at 567), the pending criminal proceedings against petitioner presented similar justifications for delay in beginning civil forfeiture proceedings, because "[a] prior civil suit * * * may provide improper opportunities for the claimant to discover the details of a contemplated or pending criminal prosecution." See *United States* v. *$874,938.00 in United States Currency*, 999 F.2d 1323, 1325-1326 (9th Cir. 1993) (finding similar delay reasonable). Petitioner

has made no showing that the government failed to proceed with diligence in this case. And he has neither alleged nor shown that the delay between the seizure and the forfeiture proceeding affected his ability to contest the merits of the forfeiture or otherwise prejudiced him.

In particular, the third factor identified in *$8,850 in United States Currency* weighs heavily against petitioner. He did not file his "Complaint for Return of Property" until March 31, 1998—ten months after his property was seized—and he voluntarily dismissed it two months later. C.A. App. 68, 79. A claimant's own delay in seeking the commencement of judicial forfeiture proceedings can be a significant factor in determining that a delay in the initiation of those proceedings did not violate due process. See *$292,888.04 in United States Currency*, 54 F.3d at 567 (where claimant failed for 18 months to seek return of property, 30-month delay between seizure and initiation of forfeiture proceeding, while lengthy, was not unreasonable and did not offend due process); cf. *$8,850 in United States Currency*, 461 U.S. at 568-569 (claimant able to trigger rapid filing of forfeiture action if he desires it; failure of claimant to use available remedies suggests that he did not desire early judicial hearing).

Accordingly, consistent with the relevant considerations identified by this Court in *$8,850 in United States Currency*, the court of appeals correctly ruled (Pet. App. 6a), that petitioner had not shown that this delay violated his due process rights. And in any event, because petitioner's due process claim is tied to the specific facts of his case, it does not present an issue of general importance warranting review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 02-1326

In the Supreme Court of the United States

$558,723.32 IN U.S. CURRENCY, ET AL.,
ROBERT A. MICK,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether probable cause to support seizure of property is to be determined as of the date of seizure or as of the date of the forfeiture hearing.

Whether the failure of the government to follow the law requiring immediate institution of judicial forfeiture proceedings and the resultant one year delay between the seizure of property and the filing of the forfeiture complaint violated Petitioner Mick's due process rights.

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REPLY OF PETITIONER

In its reply the government acknowledges the conflict in the Circuits regarding determination of probable cause but suggests the disagreement has been resolved by Congress through the enactment on December 21, 2000 of the Civil Asset Forfeiture Reform Act (CAFRA).

CAFRA does not resolve the conflict for this Petitioner or others adversely affected by misapplication of the provisions of 19 U.S.C. §1601 et. seq. prior to that date. The action of Congress in shortening the time required for institution of forfeiture proceedings and raising the government's burden of proof to a preponderance of the evidence does, however, underscore the denial of due process in this case.

Under the amended provisions of CAFRA the government may prove its case based on evidence acquired after the filing of the forfeiture complaint. See 18 U.S.C. §983(c)(2). The government would seemingly apply this provision retroactively since the best evidence sited in the government's statement here consists of evidence presented during this Petitioner's criminal trial which took place more than two years after the seizure and one year after the filing of the forfeiture complaint.

The government, having presented CAFRA as a shield for its failure to comply with the provisions of 19 U.S.C. §1601 et. seq in this action, should also concede that CAFRA now requires the filing of a forfeiture complaint not later than 90 days after a claim has been filed for the subject property. See 18 U.S.C. §983(a)(3)(A). In this case the forfeiture complaint was not filed until more than eight months after the Petitioner's first claim was filed.

CAFRA also requires written notices to interested parties no more than 60 days after the date of seizure. See 18 U.S.C. §983(a)(1)(A)(i). In this case the government intentionally employed a piecemeal approach by forwarding separate notices for various items seized and did not forward the notices for the $685,673.32 cash until February 4, 1998, more than eight months after seizure. Even then the government waited an additional four months before filing the forfeiture complaint.

Nowhere in the government's response is there any explanation for the failure to comply with the still-existing provisions of 19 U.S.C. §1610 which prohibited the administrative forfeiture proceeding employed here and required the immediate filing of a judicial forfeiture complaint since the combined assets had a value in excess of $500,000.00.

I. Despite Enactment of the Civil Asset Forfeiture Reform Act (CAFRA) a Conflict Remains Between the Circuits Regarding Determination of Probable Cause for Forfeitures Instituted Prior to December 21, 2000.

In response to the conflict in the Circuits and perhaps the abuse of the system in situations like ours, Congress specifically authorized the use of after-acquired evidence in determining the legality of a forfeiture seizure, but raised the government's burden of proof to a preponderance of the evidence.

There still remain numerous cases still working their way through the courts which require specific direction from

this court as to when probable cause for forfeiture seizure is required. This remains an issue of great public interest and impact.

Even if CAFRA seems to resolve the statutory question, the constitutional question remains. Is the practice of the Sixth Circuit in measuring probable cause based on evidence acquired years after the initial seizure consistent with the constitutional requirements of the Fourth Amendment? Clearly it is not. The conflict between the Circuits on this issue is separate and distinct from any remedy provided by CAFRA, and remains for this Court's resolution.

II. The Revisions Contained in CAFRA Support Petitioner's Claim of Due Process Violations in These Proceedings

The government's conduct in this case failed to conform with the then-existing statutory requirements of 19 U.S.C. §1601 et. seq. The timing of notices and the filing of the complaint also failed to comply with the newly-revised requirements contained in CAFRA.

By any measure, the government failed to comply with the fundamental statutory requirements for processing a forfeiture complaint following seizure. Petitioner's argument in this regard is unrebutted.

III. The Government's Response to the Due Process Claim Fails to Address the Government's Noncompliance with the Requirements of 18 U.S.C. §1610.

The government in its Response did not even attempt to respond to its failure to commence an immediate judicial forfeiture pursuant to the requirements of 18 U.S.C. §1610. There is no response, no explanation, no excuse.

The failure to comply with this statutory requirement constitutes a clear violation of constitutional due process as well.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

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